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TAMAN BUAYA LANGKAWI SDN BHD v. PP

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
RAVINTHRAN PARAMAGURU JCA
GUNALAN MUNIANDY JCA
B [CRIMINAL APPEAL NO: B-09-8-01-2020]
28 JANUARY 2022

Abstract – *Imposition of conditions for the issuance of a license under s. 14 of the Wildlife Conservation Act 2010 ('WCA') is subject to the prerogative of the licensing officer, and it is different from the power of the Director General under s. 35 of the same Act which conditions are linked to government policy and are more general in nature as they govern the granting of licences. While there are other sections in the WCA that mandated gazettement of various matters therein, there is no such requirement under s. 14 of the WCA. Hence, the non-gazettement of the relevant conditions in the charges against the offender under s. 125(D) of the WCA did not render the charge groundless.*

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E ***CRIMINAL PROCEDURE:*** *Charge – Framing or particulars of – Charges under s. 125(d) of Wildlife Conservation Act 2010 – Non-recording of transactions in registration book issued by Wildlife Department – Non-gazettement of conditions of licence which formed basis of charge – Whether licensing officer given power to impose conditions deemed fit – Whether conditions required to be gazetted before being imposed by licensing officer – Whether non-gazettement of relevant conditions in charges rendered charge groundless – Wildlife Conservation Act 2010, ss. 14 & 35*

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STATUTORY INTERPRETATION: *Interpretation of Acts – Intention of Legislature – Sections 14 and 35 of Wildlife Conservation Act 2010 – Whether s. 14 require the conditions imposed by licensing officer to be gazetted – Whether court restricted from reading words into s. 14 that link to s. 35 – Whether s. 14 provides for specific conditions imposed by licensing officer on licence – Whether conditions under s. 35 linked to government policy and general in nature*

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H The appellant, who had been issued with a 'Dealers Licence/Taxidermist' under the Wildlife Conservation Act 2010 ('WCA'), was charged for not recording three receipted transactions in the registration book issued by the Wildlife Department. The charges against the appellant were (i) three charges under s. 125(d) of the WCA; and (ii) one charge under s. 10(b) of the International Trade in Endangered Species Act 2008. In light of the evidence that Condition No. 10, the basis of the charge, was not gazetted, the appellant applied to strike out the first to third charges under s. 173(g) of the Criminal Procedure Code as being groundless. However, the application was

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dismissed by the Sessions Court on the ground that gazettement was not required for conditions of licence that are imposed under s. 14 of the WCA. The High Court affirmed the decision and hence, this appeal, the principle issue of which was whether the fact that the relevant condition of the licence *ie*, Condition No. 10, was not gazetted rendered the charge groundless.

Held (dismissing appeal; trial ordered to proceed in Sessions Court)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) Section 14 of the WCA is a separate and independent provision that allows the licensing officer to impose conditions on the licence granted. The conditions are not necessarily conditions that had been enacted in a subsidiary legislation pursuant to the power of the Director General ('DG') under s. 35. Section 14 states that a licence 'may be granted subject to such conditions as the licensing officer thinks fit to impose'. Thus, s. 14 is operative at the time a licence is issued and hence, the said conditions on the licence. Section 35, on the other hand, provides that the DG with the approval of the Minister may prescribe 'conditions with respect to the granting of licences'. The same section provides that the said power is also in respect of regulation of the hunting season, types of wildlife that may be hunted, quota of licences and the like. Thus, the conditions under s. 35 are linked to government policy and are more general in nature as they govern the granting of licences whereas s. 14 provides for specific conditions that are imposed by the licensing officer on the licence that is granted. (para 9)

(2) There is nothing in the WCA to suggest that the conditions that can be imposed under the authority of s. 14 are limited to conditions prescribed by the DG under s. 35. Such a reading would do violence to the plain language of s. 14 which stands independently of any other provision. Section 14 does not require the conditions imposed by the licensing officer to be gazetted. Hence, the appellant's argument that s. 35 would be rendered otiose if the licensing officer could impose ungazetted conditions on the licence was unfounded. (paras 10 & 11)

(3) Parliament had, in clear and unequivocal language, given the power to the licensing officer to impose conditions on the licence as he sees fit. Assuming that any condition imposed is plainly unreasonable or irrational, the judicial review process is available to any dealer, such as the appellant, to challenge it. But it is not the function of the court to find a way to restrict that power by reading into s. 14 words that link it to s. 35. For that reason, the second argument that Condition No. 10 was a repeat of s. 37 was also without any merit. It was a separate condition imposed on the licence under the authority of s. 14. (para 12)

Legislation referred to:
Criminal Procedure Code, s. 173(g)
International Trade in Endangered Species Act 2008, s. 10(b)
Wildlife Conservation Act 2010, ss. 5, 14, 34, 35, 37, 47, 125(d), 133, 134

For the appellant - Muhammad Shafee Abdullah & Wee Yeong Kang; M/s Shafee & Co
For the respondent - Norzilati Izhani Zainal; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Appeal No. BA-42ES-2-05-2019 (affirmed).]

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] The appellant was charged under the Wildlife Conservation Act 2010 with three charges under s. 125(d) before the Sessions Court. Another charge was preferred under s. 10(b) of the International Trade in Endangered Species Act 2008. The instant appeal concerns the offences under the Wildlife Conservation Act 2010 (the WCA).

Background Facts

[2] The appellant was issued a "dealers licence/taxidermist" under the WCA. Section 125(d) of the Act criminalises the breach of conditions stated in the said licence. It reads as follows:

> **125. General Offence**
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> Any person who contravenes or fails to comply with-
>
> (a) - (c)
>
> (d) the conditions or requirements specified in a licence, permit or special permit,
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> commits and offence and shall, where no penalty is expressly provided, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[3] The condition that the appellant allegedly transgressed was Condition No. 10 which was stated in the licence. It reads as follows:

> 10. Pemegang lesen perniagaan perlu merekod semua urusniaga dengan beresit di dalam Buku Daftar Peniaga/Taksidermi Hidupan Liar yang dikeluarkan oleh Jabatan Perhilitan.

[4] Thus, the appellant was charged for not recording three receipted transactions in the registration book issued by the Wildlife Department. The trial before the Sessions Court commenced uneventfully until the second witness for the prosecution gave evidence. Counsel for the appellant elicited

an answer from the said witness during cross-examination to the effect that Condition No. 10 which was the basis of the charge was not gazetted. Thereupon, counsel for the appellant applied to the Sessions Court Judge to strike out the first to third charges under s. 173(g) of the Criminal Procedure Code as being groundless. The Sessions Court Judge invited written submissions but before she could rule on the application, another judge succeeded her. The second Sessions Court Judge took over the case and dismissed the application on the ground that gazettement was not required for conditions of licence that are imposed under s. 14 of the Act. The High Court affirmed his decision and hence this appeal.

Issues

[5] The principal issue in this appeal is whether the fact that the relevant condition of the licence *ie*, Condition No. 10 is not gazetted renders the charge groundless. In order to appreciate the argument of learned counsel, it is necessary to have regard to ss. 14, 35 and 37 of the WCA. For ease of reference, we set out these provision below:

Section 14

(1) The licensing officer may, after considering the application made under section 12, approve or refuse the application.

(2) In the case of an application for a special permit, the licensing officer may approve the application only after obtaining the approval of the Minister.

(3) Where an application for a licence, permit or special permit is approved, the licence, permit or special permit shall be granted upon payment of the prescribed fee.

(4) A licence, permit or special permit **may be granted subject to such conditions or restrictions as the licensing officer thinks fit to impose**.

(5) The decision of the licensing officer to grant or not to grant a licence, permit or special permit shall be communicated to the applicant by notice in writing as soon as practicable.

(emphasis added)

Section 35

The Director General may, with the approval of the Minister, by order published in the **Gazette, prescribe conditions with respect to the granting of licences**, permits and special permits and without prejudice to the generality of the foregoing may in particular prescribe:

(a) the open season and close season in respect of protected wildlife;

(b) the number of:

(i) wildlife which may be hunted; and

(ii) part or derivative of wildlife which may be taken;

A (c) the methods or means by which any wildlife may be hunted, including the type of arm or trap to be used;

(d) the times during which, and the places where, any wildlife may be hunted, or the nest or egg of any wildlife may be taken;

(e) the quota of licences and permits to be granted for:

B (i) each of the activities specified under sections 9 and 10;

(ii) each year or open season; and

(iii) each State, in respect of each protected wildlife or any part or derivative of wildlife; and

C (f) the standard of maturity of wildlife which may be hunted.

(emphasis added)

Section 37

(1) A licensed dealer shall keep and **maintain a record consisting of the following particulars**:

D (a) the number and species of wildlife (live or dead), the number of parts or derivatives of wildlife and the number of articles manufactured from any wildlife or part or derivative of any wildlife, which were purchased, acquired or sold;

E (b) the name, address and licence number, of the person from whom the wildlife, parts or derivatives of wildlife or articles were purchased or acquired;

(c) the name, address and licence number, if any, of the person to whom the wildlife, parts or derivatives of wildlife or articles were

F sold;

(d) the receipt number issued for any sale or purchase; and

(e) the date of any purchase, acquisition or sale.

(2) Any licensed dealer who contravenes subsection (1) commits an

G offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding six months or to both. (emphasis added)

[6] The first argument of counsel for the appellant was that Condition No. 10 did not receive approval from the Minister and was not gazetted

H under s. 35 of the WCA. Counsel submitted that s. 35 empowers the Director General with the approval of the Minister to create subsidiary legislation to prescribe conditions for the granting of licences and permits. However, this was not done in respect of Condition No. 10 which was imposed by the licensing officer on the "dealer's licence/taxidermist" that was issued to the

I appellant. Counsel for the appellant also argued that the Sessions Court and the High Court had rendered s. 35 otiose because they held that s. 14 gives

a separate power to the licensing officer to impose conditions on the licence. He further submitted that the correct reading of s. 14 is that the licensing officer can only impose conditions that are already provided in the WCA or conditions that are gazetted under s. 35 pursuant to the power of the Director General and the Minister. In other words, the licensing officer cannot create a new condition and impose it on the licence that he issues.

[7] On the other hand, learned DPP argued as follows. She submitted that the power of the licensing officer under s. 14 is different from the power of the Director General under s. 35. Section 14 is in respect of the power of the licensing officer to impose conditions on the licence that is granted to an applicant whereas s. 35 is in respect of conditions governing grant of licences. She also referred to other sections in the WCA that mandate the gazettement of various matters provided therein (see ss. 34, 47, 133 and 134). However, s. 14 contains no such stipulation.

[8] The second argument of counsel for the appellant is that the record that should be prepared and kept by the appellant under s. 37 of the WCA is similar to the requirement in Condition No. 10. The difference is that there is no reference to the official "buku daftar" in s. 37. It follows that Condition No. 10 is an additional condition that did not satisfy s. 35 of the WCA. The response of the learned DPP is that Condition No. 10 is a separate condition that can be imposed under s. 14.

Our Decision

[9] In our opinion, s. 14 is a separate and independent provision that allows the licensing officer to impose conditions on the licence that he grants. The conditions are not necessarily conditions that had been enacted in a subsidiary legislation pursuant to the power of the Director General under s. 35. We came to this conclusion based on the different language employed in respect of the purpose of the conditions in s. 14 and s. 35. Section 14 states that a licence "may be granted subject to such conditions as the licensing officer thinks fit to impose". Thus, s. 14 is operative at the time a licence is issued. This is the reason that the said conditions as in the case of the impugned Condition No. 10 were printed on the licence. On the other hand, s. 35 says that the Director General with the approval of the Minister may prescribe "conditions with respect to the granting of licences". Furthermore, the same section provides that the said power is also in respect of regulation of the hunting season, types of wildlife that may be hunted, quota of licences and the like. Thus, the conditions under s. 35 are linked to Government policy and are more general in nature as they govern the granting of licences whereas s. 14 provides for specific conditions that are imposed by the licensing officer on the licence that is granted.

A **[10]** In our opinion, there is nothing in the WCA that suggests that the conditions that can be imposed under the authority of s. 14 are limited to conditions that are prescribed by the Director General under s. 35. Such a reading would do violence to the plain language of s. 14 which stands independently of any other provision. And as pointed out by the learned B DPP, s. 14 does not require the conditions imposed by the licensing officer to be gazetted.

[11] We have also given anxious consideration to the argument of counsel for the appellant that s. 35 would be rendered otiose if the licensing officer can impose ungazetted conditions on the licence. We find that such a fear is C unfounded. As we said earlier, the conditions referred to in s. 35 appear to be more general in nature to govern the granting of licences as opposed to conditions imposed on licenses that are actually granted. In fact, various subsidiary legislation under s. 35 have been published in the *Gazette* to give effect to Government policy in relation to wildlife hunting and quotas as we D said earlier (see Wildlife Conservation (Quota of Licence) Order 2013, Wildlife Conservation (Hunting Prohibited Areas) Order 2013, Wildlife Conservation (Close Season) Order 2016, etc).

[12] In respect of the power of the licensing officer, counsel for the appellant also submitted that s. 14 if read separately from s. 35, would result E in him having too much power. For good measure, counsel for the appellant recalled the words of Lord Acton that "power corrupts and absolute power corrupts absolutely". Our short answer to that argument is that Parliament had in clear and unequivocal language given the power to the licensing officer to impose conditions on the licence that as he sees fit. Assuming that any F condition that is imposed is plainly unreasonable or irrational, the judicial review process is available to any dealer such as the appellant to challenge it. But it is not the function of the court to find a way to restrict that power by reading into s. 14 words that link it to s. 35. For that reason, the second argument of counsel for the appellant that Condition No. 10 is a repeat of G s. 37 is also without any merit. It is a separate condition imposed on the licence under the authority of s. 14.

[13] For all the above reasons the appeal is dismissed and we order the trial to proceed in the Sessions Court.

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